

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY
JUDGMENT ON COUNTS 7 & 8 OF THE SECOND AMENDED COMPLAINT
(DKT. NO. 2057)**

Summary judgment should be granted, in whole or in part, to dismiss Plaintiffs' state statutory claims in Counts 7 and 8 for each of the reasons set forth herein.¹

I. Land Application Of Poultry Litter In Compliance With The Specific Rates And Instructions In Animal Waste Management Plans ("AWMPs") Is Authorized By Law And Cannot Violate The Statutory Provisions In Counts 7 & 8

The statutory claims in Counts 7 and 8 rest entirely on Plaintiffs' unsupported argument that AWMPs are "simply [] guidance document[s]." *Plaintiffs' Response in Opposition*, Dkt. No. 2166 at 19 ("Opposition" or "Opp."); *see id.* at 18-21. Rather than identify evidence of specific violations of the AWMPs and comprehensive poultry litter regulations enacted by the Oklahoma Legislature, Plaintiffs claim that each and every application of poultry litter in the Oklahoma portion of the IRW constitutes a violation of the Registered Poultry Feeding Operations Act (RPFO Act) (Count 8) and Oklahoma law (Count 7).² Plaintiffs are wrong. The statutes and regulations enacted pursuant to the RPFO Act plainly state that AWMPs constitute legal authorization and permits to land-apply poultry litter in compliance with the application rates and instructions prescribed therein.

A. AWMPs Constitute Legal Authorization to Apply Poultry Litter to Land in Conformance with the Specific Rates and Instructions Contained Therein

As Plaintiffs admit, the Oklahoma Legislature enacted the RPFO Act for the purpose of regulating the land application of poultry litter in Oklahoma. *See Opp.* at 18; *Mot.* at 19. To regulate the precise timing, location and amount of poultry litter that may be applied in accordance with the law, the RPFO Act requires that "[e]very poultry feeding operation shall

¹ *See Defendants' Joint Motion for Summary Judgment on Counts 7 & 8 of the Second Amended Complaint*, Dkt. No. 2057 ("Motion" or "Mot.").

² *See Opp.* at 25 ("evidence suffices to make out violations of the RPFO Act as to *each* land application of poultry waste in the Oklahoma portion of the IRW"); *id.* ("some of this poultry waste *always* runs off from the fields in the Oklahoma portion of the IRW where it has been land applied, [and] ... this poultry waste runoff is not only likely to cause pollution of Oklahoma's waters, it is causing pollution of Oklahoma's waters") (emphasis in original); *Mot.* at 16-17 n.9.

have an [AWMP]” and comply with the application rates and instructions set forth therein. 2

Okla. Stat. § 10-9.7(C); Okla. Admin. Code § 35:17-5-3(b); *see, e.g.*, Mot. Exs. 21-25

(AWMPs). For the convenience of the Court, the full text of the relevant RPFO Act provisions related to the AWMPs is attached as Exhibit A. Contrary to Plaintiffs’ interpretation, these statutes and regulations clearly authorize the use of poultry litter in conformance with the specific application rates and instructions contained in the AWMPs. *See* Mot. at 17-22.³

First, the RPFO Act expressly mandates that each AWMP set forth “land application rates” based on “a soil test and current [USDA Natural Resources Conservation Service (NRCS)] phosphorus standards.” 2 Okla. Stat. § 10-9.7(C)(5); Okla. Admin. Code § 35:17-5-3(b)(6), (7). Each Oklahoma AWMP similarly states that “[t]he law requires that the [NRCS] recommendations for litter application rates be followed,” and details the specific time, location and amounts of poultry litter that may be applied to each parcel of land based on the results of soil tests and current NRCS standards. *See, e.g.*, Mot. Exs. 21-25. Simply put, a farmer must have an AWMP to apply litter and must follow the AWMP’s requirements precisely. Plaintiffs are incorrect to call this mere “guidance” that a farmer may elect to follow or ignore.⁴

³ The regulations enacted pursuant to the Oklahoma Poultry Waste Applicators Certification Act mirror the RPFO Act by requiring Non-Growers to obtain and comply with the instructions set forth in AWMPs or “Conservation Plans” incorporating “the most recently published [USDA] Natural Resources Conservation Service Waste Utilization Standards.” 2 Okla. Stat. §§ 10-9-19, 10-9-19(a). Accordingly, the arguments and reasoning set forth herein apply equally to the land application of poultry litter by both Growers and Non-Growers.

⁴ Plaintiffs’ contrary interpretation is based on the testimony of their retained expert, Dr. Gordon Johnson, who opines that the law *should* prohibit application of litter to soils that have a 65 soil test for phosphorus. *See* Ex. B at ¶¶5b, 7a. However, Dr. Johnson has admitted that his theory conflicts with controlling state laws and prevailing federal guidance (including Oklahoma law and the NRCS), and has been rejected by state and federal regulators because the use of poultry litter at levels above 65 STP can benefit crops without causing negative environmental impact. *See* P.I.T. at 579:25-581:12 (Ex. C); Johnson Dep. at 62:11-64:25, 85:13-21 (Ex. D); Ex. E at 5-6, 28-32. The NRCS standards adopted by the Oklahoma Legislature express its best judgment as to the appropriate balance between the agricultural and economic benefits from the use of poultry litter as a fertilizer and sound environmental protections. *See* Okla. Admin. Code §

Second, Plaintiffs’ assertion that “AWMPs are not issued by the State or approved by the State” is plainly wrong. Opp. at 20. The Oklahoma Legislature expressly authorized and approved the preparation of AWMPs “by the USDA NRCS or an entity approved by the State Department of Agriculture” such as the Oklahoma Department of Agriculture, Food and Forestry (ODAFF). Okla. Admin. Code § 35:17-5-3(b)(3). AWMPs are therefore drafted, issued and approved by legally authorized agents acting on behalf of the State of Oklahoma.⁵

Third, the RPFO Act expressly places the burden on the State and its authorized agents to draft the AWMPs in a manner ensuring compliance with the general prohibitions relied upon by Plaintiffs. The RPFO Act states that “the procedures documented in the [AWMPs] must ensure” compliance with certain prohibitions and requirements by tailoring the “[t]iming and rate of applications ... based on assimilation capacity of the soil profile, assuming usual nutrient losses, expected precipitation, and soil conditions.” 2 Okla. Stat. § 10-9.7(C)(6)(c); Okla. Admin. Code § 35:17-5-5; *see also* 2 Okla. Stat. § 10-9.7(B)(4). In so doing, the Legislature set forth parameters for the design of AWMPs and Best Management Practices, and placed the burden on the State and its authorized agents to set forth practices, instructions and application rates in the AWMPs that ensure compliance with these requirements. *See id.* Significantly, each of the RPFO Act provisions that Plaintiffs allege to have been violated are set forth in the statutory sections which detail the considerations that the State must apply in drafting AWMPs—not prohibitions for which individuals may be held liable. *See* Opp. at 22. The purported “centerpiece of the RPFO Act” is not the requirement that farmers and ranchers must somehow

35:17-5-1; 27A Okla. Stat. § 2-6-102; Mot. at 20-21. Because the State has authorized the use of poultry litter in accordance with these standards, Plaintiffs’ disagreement is irrelevant. *See E.I. du Pont de Nemours Powder Co. v. Dodson*, 150 P. 1085, 1087 (Okla. 1915) (“when the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires”).

⁵ Indeed, each Oklahoma AWMP bears ODAFF’s name and seal. *See, e.g.,* Mot. Exs. 21-25.

ensure “that (1) there be no runoff from land-applied poultry waste, ... [and] (2) land-applied poultry waste not pollute the water or create an environmental or health hazard,” Opp. at 18-19, but rather that the state-authorized agents drafting the “procedures documented in the AWMPs must ensure” that these requirements are satisfied through compliance with the instructions set forth therein. 2 Okla. Stat. §§ 10-9.7(B)(4), (C)(6); Okla. Admin. Code § 35:17-5-5.⁶ A farmer is not left to wonder what more he needs to do beyond the specific instructions the State provides in his AWMP. The State’s agents are required to craft AWMPs in accordance with the law’s requirements so that compliance with the AWMP is compliance with the law.⁷

Fourth, the canons of statutory interpretation require that the specific statutory provisions authorizing the application of poultry litter at rates set forth in AWMPs cannot be controlled or nullified by the general provisions relied upon by Plaintiffs in Counts 7 and 8. *See* Mot. at 18-19. Similarly, Plaintiffs’ interpretation of the statutory regime should be rejected because it

⁶ Even if Plaintiffs are correct that the NRCS standards used in the design of AWMPs purportedly result in “runoff” or “pollution,” farmers and ranchers cannot be held liable for following their State-issued AWMPs. The Oklahoma Legislature placed the burden on the State and its authorized agents—not farmers and ranchers—to determine the application rates and instructions that will ensure compliance with state law. *See supra* at 3-4.

⁷ The testimony of the authors of the plans and state enforcement officials affirm that AWMPs are designed to satisfy all of the requirements of the RPFO Act and Oklahoma law through the use of the NRCS standards adopted by the Oklahoma Legislature and Department of Agriculture. *See* Pham Dep. at 27:1-9, 31:19-33:3, 62:25-63:23 (Ex. F); Abernathy Dep. at 36:3-25 (Ex. G); Littlefield Dep. at 108:13-19 (Ex. H); Thompson Dep. at 16:15-22:25, 31:7-23 (Mot. Ex. 30); 2 Okla. Stat. § 10-9.1(B)(1) (“‘AWMP’ means a written plan that includes a combination of conservation and management practices *designed to protect the natural resources of the state* as required by the State Department of Agriculture pursuant to the provisions of ... this act.”).

Although Plaintiffs cite testimony for the conflicting premise that “compliance with an AWMP does not necessarily equate to full compliance with the requirements of Oklahoma law,” Opp. at 20, this testimony is either flatly contradicted by the witnesses’ own statements, *see, e.g.*, Littlefield Dep. at 108:13-19 (Ex. H), or contradicted by the State’s enforcement of the regulations whereby action is taken *only* as a result of the “failure by a poultry feeding operation to utilize or comply with Best Management Practices or the Animal Waste Management Plan,” Okla. Admin. Code § 35:17-5-10.1(H), (I) (“Violation points system”); *see, e.g.*, Gunter Dep. at 57:13-61:2, 63:4-12 (Ex. I); Parrish Dep. at 259:19-25 (Ex. J).

would, by Plaintiffs' own admission, render compliance an impossibility and produce absurd results.⁸ *See id.* at 19-20; Opp. at 25 (claiming that every application of litter in compliance with a State-drafted AWMP constitutes a violation of the RPFO Act and Oklahoma law).

The Ninth Circuit's *en banc* decision in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), is instructive as to the legal affect of AWMPs within Oklahoma's regulatory regime. In *Carson Harbor*, the plaintiff alleged that defendants (public water utilities) had discharged storm water containing pollutants onto plaintiff's property. *See id.* at 869-70. The Ninth Circuit affirmed the lower court's summary judgment dismissal of the claims because defendants' storm water discharges containing pollutants were authorized by permits issued by the State. *See id.* at 870 ("Because [plaintiff] failed to show that the [utilities] violated the NPDES permits ... any pollutants discharged into the storm water were permissible."). This holding is particularly significant given that the California Water Code contains the same type of general provisions relied upon by Plaintiffs, which prohibit "any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance." Cal. Water Code § 13304(A). Just as the permits in *Carson Harbor* constituted legal authorization to perform the regulated activity, the AWMPs that are issued and approved by the State of Oklahoma constitute legal authorization for the land application of poultry litter in accordance with the specific instructions contained therein.⁹ Because Plaintiffs have not identified evidence of specific violations of the AWMPs,¹⁰

⁸ Indeed, if Plaintiffs' interpretation were accepted, numerous regulatory regimes would incur liability based on these same general prohibitions. For example, the operators of wastewater treatment plants in the Oklahoma portion of the IRW would be liable for violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1(A) as a result of their release of phosphorus compounds in each wastewater discharge, despite the presence of regulations and permits authorizing such conduct. *See* Dkt. No. 2069 at 13-14 ¶¶49-53 (documenting state-authorized phosphorus discharges from wastewater treatment plants); 27A Okla. Stat. § 2-6-205.

⁹ Notably, Plaintiffs do not identify a single instance in which specific instructions drafted,

Counts 7 and 8 must be dismissed. *See Carson Harbor*, 270 F.3d at 870; Mot. at 16-22, 24.

Finally, even if accepted, Plaintiffs' proposed interpretation of Oklahoma law would render the statutory provisions in Counts 7 and 8 so vague as to deprive them of meaning in violation of the Due Process Clause of the Fourteenth Amendment. *See* Mot. at 21-22. Pursuant to the void-for-vagueness doctrine, the Due Process Clause prohibits the invocation of penalties "where one could not reasonably understand that his contemplated conduct is proscribed." *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963); *see Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926). Here, Plaintiffs would require that farmers and ranchers follow the specific instructions contained in AWMPs while *also* ensuring—through unspecified means—that "pollution" or "runoff" does not or is not likely to result. *See* Opp. at 18-21.

For example, Ricky Reed is the owner and operator of a combined poultry growing and cattle raising business. *See* Mot. Ex. 10 at Reed Aff. ¶¶3-7. In November 2006, the State of Oklahoma issued and approved an AWMP for Mr. Reed, which provided specifically-tailored soil test results, best management practices, and application rates and instructions listing the precise amount of poultry litter that he is authorized to apply to each separate field on his farm. *See* Mot. Ex. 21 at 2-5. Mr. Reed has testified that he uses poultry litter as an "economical and

issued and approved by the State were considered mere "guidance." Further, Plaintiffs cannot distinguish *Carson Harbor* simply because California included the term "permit" in the title of the documents. *See, e.g.*, Dkt. No. 2131 at 18 n.9. A "permit" is merely "a certificate evidencing permission; a license." *Black's Law Dictionary*, 1176 (8th ed. 2006).

¹⁰ *See* Mot. at 8-9 ¶¶24-26; Dkt. No. 2183 at 18-19 ¶39 n.77. With exception of five specific instances identified by Plaintiffs in which alleged violations have been adjudicated through official recommendations and/or the imposition of penalties, *see* Opp. at 25 (citing *id.* at 8 ¶20, 12 ¶26), Plaintiffs improperly attempt to shift the burden of proof to Defendants on this point. *See* Opp. at 9-10 ¶24. The law requires that Plaintiffs—not Defendants—satisfy the burden of proof with respect to each element of the claim. *See Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004). Because Defendants cannot be held liable for applications of poultry litter in conformance with the law, Plaintiffs must tailor their evidence and claims to exclude reference to this conduct.

effective fertilizer ... [to] grow and cut enough hay each year to feed [his] cattle” and in so doing complies with “all laws and regulations.” Mot. Ex. 10 at Reed Aff. ¶¶7-8. Despite Mr. Reed’s compliance with the specific instructions contained in his AWMP, Plaintiffs argue that each and every application of litter on Mr. Reed’s farm constitutes a violation of the RPFO Act (Count 8) and Oklahoma law (Count 7). *See supra* at 1 n.2. Although Plaintiffs would have this Court believe that the “standards are well defined,” Opp. at 21, in reality farmers and ranchers cannot know what they are supposed to do.¹¹ The Supreme Court has established that invocation of penalties in such circumstances violates the “fair notice” requirement of the Due Process Clause.¹² To avoid this unconstitutional result, Plaintiffs’ interpretation must be rejected.

II. Plaintiffs Have Not Established Evidence Of “Runoff” As Defined By Oklahoma Law¹³

To establish each allegation of “runoff” in violation of the RPFO Act (Count 8), the statutory provisions require that Plaintiffs must identify evidence that “poultry waste” itself has “runoff” into the waters of the State. *See* Mot. at 23-24.¹⁴ Because Plaintiffs have not developed evidence of such violations, Plaintiffs seek to improperly expand the definition of “poultry waste” to impose liability for the alleged “runoff” of every nutrient molecule or bacteria resulting from the decomposition of poultry litter. *See* Opp. at 22-24. Plaintiffs’ interpretation clearly

¹¹ Nowhere do Plaintiffs even attempt to explain how—absent the specific instructions in the AWMPs—farmers would be able to decipher the amount of poultry litter that may be used at any given time or location to avoid such “pollution” or “runoff.” Indeed, Plaintiffs’ own expert could not even identify the levels of phosphorus or bacteria that would constitute “pollution” as defined by these statutes. *See* Fisher II Dep. at 459:3-461:24 (Mot. Ex. 29).

¹² *See* Mot. at 21-22; *see, e.g., Champlin Refining Co. v. Corp. Comm.*, 286 U.S. 210, 242-43 (1932) (holding law prohibiting production of “waste” unconstitutional because “[t]he meaning of the word ‘waste’ necessarily depends upon many factors” and is “vague and indefinite”).

¹³ Notably, Plaintiffs have conceded their inability to substantiate claims of alleged “discharges” of poultry litter in violation of Oklahoma law. *See* Opp. at 22 n.6.

¹⁴ *See* Okla. Admin. Code § 35:17-5-2 (defining “[r]unoff” as any release “of *poultry waste* into waters of the State”); 2 Okla. Stat. § 10-9.1(B)(21) (defining “[p]oultry waste” as “poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation”).

conflicts with all prior enforcement of the RPFO Act and the plain meaning of the statutory text, which defines “poultry waste” as “poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation.” 2 Okla. Stat. § 10-9.1(B)(21). Moreover, by Plaintiffs’ own admission, such an interpretation is impossible to satisfy. *See supra* at 1 n.2; Peach Dep. at 140:18-142:12 (Ex. K).¹⁵

III. The RPFO Act Does Not Apply To Defendants (Count 8)

The RPFO Act applies only to owners and operators of “poultry feeding operations”—not “Integrators.” *See* Mot. at 11-15. Plaintiffs’ sole basis for arguing that Defendants may be held liable under the Act is their unsupported contention that “growers are Defendants’ employees or agents.” Opp. at 14. This argument fails for two reasons.

First, the RPFO Act expressly distinguishes between the owners and operators of “poultry feeding operations” (*i.e.* Growers) and Defendant “Integrators.” 2 Okla. Stat. § 10-9.1(B)(13), (20). The plain text of the Act and the State’s enforcement thereof clearly demonstrate that Integrators cannot be held liable for alleged violations by the “poultry feeding operations” who contract with Defendants to raise poultry. *See* Mot. at 11-15.

Second, Plaintiffs’ assertion that “growers are Defendants’ employees or agents” is demonstrably false as a matter of law. Growers are independent contractors—not employees or agents—as evidenced by (i) the “nature of the contract between the parties,” *Page v. Hardy*, 334 P.2d 782, 784 (Okla. 1958), whereby Defendants and Growers expressly agree that Growers are “Independent Contractor[s] ... engaged in and exercising independent employment under the terms of th[e] contract;”¹⁶ and (ii) the details of Growers’ occupation.¹⁷ Moreover, Plaintiffs’

¹⁵ *See In re Holt*, 932 P.2d 1130, 1134 (Okla. 1997) (declining to assume that the legislature created a statute that is impossible to comply with).

¹⁶ Mot. Ex. 2 at TSN59503SOK (“[Grower] is not a partner, agent, representative or employee of the Company.”); *see also, e.g.*, Mot. Exs. 2-7.

alleged evidence of control relates solely to the “poultry production process,” Opp. at 14-15 (citing *id.* at 2-4 ¶2), and not the wholly separate regulated activity in which Growers transfer, sell or use their poultry litter as a fertilizer, at their own discretion. See Mot. at 4-5 ¶¶9-14.¹⁸ Accordingly, Plaintiffs cannot satisfy their burden to prove the existence of an employee/agent relationship, and have identified no legal authority to the contrary. See Opp. at 14-15.

IV. Defendants Cannot Be Held Liable For The Conduct Of Non-Growers (Counts 7 & 8)

Approximately 50 percent of poultry litter used as fertilizer in the IRW is land applied by farmers, ranchers and others that have no contractual relationship with any Defendant (“Non-Growers”), but instead use poultry litter obtained in the commercial marketplace operated, at least in part, by the State of Oklahoma.¹⁹ Plaintiffs do not identify any authority²⁰ whereby

¹⁷ For example, (i) Growers “supply the instrumentalities, tools and the place of work,” pay their own expenses and hire their own personnel, see Mot. at 3 ¶5; Dkt. No. 2183 at 5 n.12; (ii) Growers are “engaged in a distinct operation,” see Mot. at 3 ¶5 (raise poultry); (iii) the “method of payment” is based on the amount of poultry produced, see Mot. Exs. 2-7; and (iv) both Growers and Defendants have a “right ... to terminate the relationship,” Mot. Exs. 2-7. Page, 334 P.2d at 784-85 (listing factors); see, e.g., *Fairmont Creamery Co. v. Carsten*, 55 P.2d 757, 758 (Okla. 1936) (existence of independent contractor relationship in analogous circumstances).

¹⁸ See also Dkt. No. 2033 at 11-17; Dkt. No. 2231 at 4-5.

¹⁹ See Mot. at 5 ¶15; Mot. Ex. 19 (“Oklahoma Litter Market”); Dkt. No. 2183 at ¶10 n.19 (citing *inter alia* Dkt. No. 2183 Ex. 2 at 57-58 (“65% of all the poultry manure [was] either transferred or sold”). Plaintiffs improperly attempt to shift their burden of proof to Defendants on this point by arguing that Defendants must “demonstrate[] the amount of poultry [litter] that might be being transferred to third parties in the IRW.” See Opp. at 6-7 ¶15, 17. Plaintiffs—not Defendants—must satisfy their burden of proof with respect to the specific amounts of poultry litter applied for which Defendants may be held liable. See *Seaboard Farms*, 387 F.3d at 1169. Because Defendants cannot be liable for the actions of Non-Growers, Plaintiffs must tailor their evidence and claims to exclude reference to this conduct.

²⁰ Plaintiffs’ statement that “section 427B liability would attach to Defendants for the transferred waste by [Contract Growers] ... to third parties” is unsupported by either fact or law. First, it is neither “foreseeable” nor “intended” that poultry litter that is sold or transferred to these Non-Growers “will be land applied *within the Oklahoma portion of the IRW.*” Opp. at 17 (emphasis added). To the contrary, the record evidence demonstrates that “[a]t least 70,000 tons of poultry litter is currently exported annually from the IRW.” Ex. L at 5; see Opp. at 17 n.5 (“the State encourages the transfer of poultry waste out of the IRW”); Dkt. No. 2183 at 13 ¶28 n.53, 16 ¶32 n.65. Further, Plaintiffs have no proof that any of the poultry litter sold or transferred to Non-

Defendants can be held liable for the actions of these Non-Growers—which include, among numerous others, the State itself.²¹ At a minimum, summary judgment is required with respect to the conduct of these Non-Growers.

V. Plaintiffs Have Failed To Identify Evidence Based On Conduct Occurring In Oklahoma

Plaintiffs concede that Counts 7 and 8 may only be applied to conduct occurring in Oklahoma. *See* Opp. at 13; Mot. at 11 n.3. Yet Plaintiffs’ purported evidence, expert analysis and damages calculations do not separate out activities taking place in Arkansas. *See, e.g.*, Opp. at 25 (citing *id.* at ¶¶ 7, 11, 16, 24-25). By Plaintiffs’ own admission, it is not possible to disaggregate their purported evidence to determine the source of the alleged pollution-causing conduct. *See* Dkt. No. 2182 at 21, 21-22 n.11. Accordingly, Plaintiffs’ evidence does not constitute relevant or admissible proof with respect to the alleged violations in Counts 7 and 8, which must be based *solely* on conduct occurring in Oklahoma. Plaintiffs’ failure to develop such evidence requires dismissal of Counts 7 and 8 in their entirety.²²

CONCLUSION

For the foregoing reasons, summary judgment should be granted to dismiss Plaintiffs’ state statutory claims set forth in Counts 7 and 8.

Growers is used in the “Oklahoma portion of the IRW” as opposed to in Arkansas. *Second*, Section 427B provides for liability based only on the “work” of a party’s “independent contractor.” Restatement (Second) of Torts § 427B. Plaintiffs do not identify any authority to extend this doctrine to the activities of a third-party based on that third-party’s use of a product purchased in the commercial marketplace—whether directly from the independent contractor or from another source. Indeed, under Plaintiffs’ theory, Defendants would be held liable for the State of Oklahoma’s own purchase and use of poultry litter as a fertilizer. *See* Dkt. No. 2069 at 9 ¶25 (documenting State’s use of poultry litter within the IRW). *Third*, Section 427B is inapplicable to Plaintiffs’ claims for the reasons detailed in Dkt. No. 2185 at 2-10.

²¹ *See* Dkt. No. 2069 at 9 ¶25 (documenting State’s use of poultry litter within the IRW).

²² Similarly, Plaintiffs have failed to develop any evidence related to the limited number of poultry feeding operations allegedly owned or operated by certain Defendants. *See, e.g.*, Opp. at 4 ¶5. In the event that the Court grants dismissal of any aspect of Counts 7 and 8, summary judgment should be likewise be granted with respect to these poultry feeding operations because Plaintiffs cannot disaggregate their purported evidence to apply solely to this alleged conduct.

Respectfully submitted,

BY: /s/ Jay T. Jorgensen

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/James M. Graves

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL
& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800

Facsimile: (501) 688-8807

**ATTORNEYS FOR PETERSON
FARMS, INC.**

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,
REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER &
GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600
**ATTORNEYS FOR CARGILL, INC. AND
CARGILL TURKEY PRODUCTION, LLC**

CERTIFICATE OF SERVICE

I certify that on the 19th of June, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	daniel.lennington@oak.ok.gov

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
-------------------	--------------------

Louis W. Bullock	lbullock@bullock-blakemore.com
------------------	--------------------------------

Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
----------------	--------------------

Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Sidley Austin LLP

jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com

Robert W. George

robert.george@tyson.com

Michael R. Bond
Erin Walker Thompson
Kutak Rock LLP

michael.bond@kutakrock.com
erin.thompson@kutakrock.com

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmnpc.com
rer@owenslawfirmnpc.com

James M. Graves
Gary V. Weeks
Paul E. Thompson, Jr.
Woody Bassett
Jennifer E. Lloyd
Bassett Law Firm

jgraves@bassettlawfirm.com
pthompson@bassettlawfirm.com
wbassett@bassettlawfirm.com
jlloyd@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
P. Joshua Wisley
Conner & Winters, P.C.

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com

Bruce W. Freeman
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

bfreeman@cwlaw.com

John H. Tucker
Leslie J. Southerland
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com
ljsoutherlandcourts@rhodesokla.com
chtucker@rhodesokla.com
thillcourts@rhodesokla.com

Terry W. West
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Todd P. Walker
Faegre & Benson LLP

dehrich@faegre.com
bjones@faegre.com
kklee@baegre.com
twalker@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves
D. Kenyon Williams, Jr.
COUNSEL FOR POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood

wfederman@aol.com
jfs@federmanlaw.com

Charles Moulton
Jim DePriest
Office of the Attorney General

charles.moulton@arkansag.gov
jim.depriest@arkansasag.gov

COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

griffithlawoffice@yahoo.com

Gary S. Chilton
Holladay, Chilton & Degiusti, PLLC

gchilton@hcdattorneys.com

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, LLP

vschwartz@shb.com
csilverman@shb.com

Robin S. Conrad
National Chamber Litigation Center, Inc.
**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND
THE AMERICAN TORT REFORM ASSOCIATION**

rconrad@uschamber.com

Richard C. Ford
LeAnne Burnett
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

fodr@crowedunlevy.com
burnettl@crowedunlevy.com

M. Richard Mullins
McAfee & Taft

richard.mullins@mcafeetaft.com

James D. Bradbury
James D. Bradbury, PLLC
**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS
ASSOCIATION OF DAIRYMEN**

jim@bradburycounsel.com

I also hereby certify that I served the attached documents by United States Postal Service,
proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
**COUNSEL FOR THE STATE OF
ARKANSAS AND THE ARKANSAS
NATURAL RESOURCES COMMISSION**

/s/ Jay T. Jorgensen